Number 30.

IN THE

Supreme Court of the United States

October Term, 1920.

IN THE MATTER

OF

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, a Delaware Corporation,

Petitioner.

BRIEF FOR RESPONDENT.

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STATEMENT.

The character of the questions involved, and the manner in which they arise, have been stated in the petition and brief, and nothing further in respect to them need be said. Copies of the pleadings and of Judge Waddill's opinion are filed with the petition, and copies of the statutes to be construed are attached to the brief for the petitioner. These, for purposes of convenience, will be referred to without making them parts of this brief. The controversy is between citizens of different states, involves more than $3,000, was brought in the Circuit Court of the City of Norfolk, removed to the District Court of the United States for the Eastern District of Virginia, and by that Court remanded to the State Court, whereupon the petitioner applied to this Court for a writ of mandamus directing Judge Waddill to vacate his order remanding the case to the State Court, redocket it in the Federal Court, and hear and determine it there. There are presented, therefore, two questions;

First, Is the petition for a writ of mandamus a proper remedy, assuming Judge Waddill erred in remanding the cause to the State Court.

Second, Did Judge Waddill err in remanding to the State Court in which it was begun a suit between citizens of different states removed to the Federal Court of a District in which neither the plaintiff nor the defendant resided?

ARGUMENT.

I.

IS THE PETITION FOR A WRIT OF MANDAMUS A PROPER REMEDY, ASSUMING JUDGE WADDILL ERRED IN REMANDING THE CAUSE TO THE STATE COURT?

If, as we believe, it is clear the petitioner has no right, whatever other remedy it may have, to a mandamus there is no reason why this Court should undertake to determine whether Judge Waddill was right or wrong in what he did. Attention will therefore be devoted chiefly to this point because a disposition of it makes, we think, discussion of the other unnecessary.

The petitioner's position seems to be, so far as we can get an idea of what its counsel really had in mind, that the propriety of the remedy by mandamus was recognized in *Ex Parte Wisner*, 203 U. S. 449, and in *In Re Moore*, 209 U. S. 990. An examination of these cases shows that in the Wisner case a mandamus was awarded directing the Federal Court to remand the cause to the State Court because the Federal Court

"had no jurisdiction to proceed."

In the Moore case the Court denied the prayer of the petition for a mandamus, not passing upon whether it was, or was not,

a proper remedy because the motion to remand had been properly denied, and the petitioner was without right to relief. In the petitioner's brief no mention is made of the numerous cases, subsequent to the Wisner and Moore cases, in which it has been repeatedly and distinctly said that a mandamus could not issue in such a case, nor is there any reference to the provisions of the Judicial Code which dispose of all cavil and question in the premises. As in our opinion the decisions and the Act of Congress referred to set at rest all doubt, and remove all room for difference of view, we will point out just what was decided in those cases and what the statute now is. In *Ex Parte Harding*, 219 U. S. 363, the question as to the propriety of the issuance of a mandamus was the point expressly decided by Mr. Chief Justice White who approved this statement of the rule

> "Mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

and said;

> "We must then either reconcile the cases or if this cannot be done determine which line rests upon the right principle, and having so determined, overrule or qualify the others, and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty.
>
> "* * * * * * Under these circumstances it becomes our plain duty, while not questioning the general doctrine announced in any of the cases, yet to disapprove and qualify *Ex Parte Wisner*, *In Re Moore*, and *In Re Winn* to the extent that those cases applied the exceptional rule of *Virginia v. Rives*, and thereby obscured the broad dis-

tinction between the general doctrine announced in *Ex Parte Hoard* and the cases which have followed it and the exception established by *Virginia v. Rives* and the cases which have properly applied the doctrine of that case."

In *Ex Parte Park Square Automobile Station*, 244 U. S. 412, Mr. Chief Justice White said;

"At the threshold, however, we are met by the suggestion that, conceding for the sake of argument that the lower court erred in refusing to remand and in taking jurisdiction, as such error was susceptible of being reviewed by the regular methods provided by the statute, that is, by certificate and direct review on the question of jurisdiction alone after final judgment, or by review of the Circuit Court of Appeals where allowed if the whole case were taken to that court, or by the exercise by this court of its power to issue a writ of certiorari in a proper case, there is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose.

"It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error, *Ex Parte Harding*, 219 U. S. 363; *Ex Parte Roe*, 234 U. S. 70, unless it be that by some exception the case is taken out of the reach of the control of the cases referred to.

" • • • • • • • And this also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law."

In *Ex Parte Park & Tilford*, 245 U. S. 82, Mr. Justice Day states the rule thus;

> "Is is elementary that the writ of mandamus will not issue to require the court to make a particular decision, and may only be invoked where the purpose is to require action of a court of competent jurisdiction, where such court has refused to exercise the power of decision with which it is invested by law."

In *Ex Parte Roe*, 234 U. S. 70, Mr. Justice Van Devanter says;

> "Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. *Chesapeake & Ohio Railway Co. v. McCabe*, 213 U. S. 207; *In Re Metropolitan Trust Co.*, 218 U. S. 312. Like any other ruling in the progress of the case, it will be regularly subject to appellate review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code Sections 128, 238; Missouri Pacific Railway Co. v. Fitzgerald, 160 U. S. 556, 582.
>
> "The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

Moreover, as pointed out in Judge Waddill's answer, to hold that the writ of mandamus may issue is, in effect, to nullify that portion of Section 28 of the Judicial Code providing;

> "Such remand shall be immediately carried into execution, and no appeal or writ of error from the decision

of the District Court so remanding such case shall be allowed."

If there could be any doubt as to the intention of Congress in using this language, it disappears in the light of Mr. Justice Bradley's opinion in *In Re Pennsylvania Co.*, 137 U. S. 451;

> "But in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The 5th section of the act of March 3, 1875 (determining the jurisdiction of the Circuit Courts) provided that the order of the Circuit Court dismissing or remanding a cause to the state court should be reviewable by the Supreme Court on writ of error or appeal, as the case might be. 18 Stat. 470, 472 c. 137. This act remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal upon orders to remand causes to the state courts, was abrogated. The provision of the act of 1887 is as follows; 'Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, *such remand shall be immediately carried into execution*, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.' 24 Stat. c. 373, 552, 553. This statute was re-enacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment, 25 Stat. c. 866, 433, 435; but the above clause remained without change. In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal Court. The abrogation of the writ of error and appeal would have had

little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdiction is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

In Black's Dillon on Removal of Causes, the effect of the enactments and the construction put upon them by this court is stated in Section 223 as follows;

"Under the present statute, therefore, it is quite clear (and the rule has often been reiterated) that the Supreme Court cannot review, on appeal or error, an order of a circuit court remanding a cause to the state court from which it was removed. Further, the new act also takes away the remedy by a mandamus to compel the circuit court to take jurisdiction."

In Foster's Federal Procedure, Fifth Edition, Volume 2, at pages 1927 and 1928, the author says;

"The Supreme Court of the United States cannot review immediately, either by appeal or writ of error, an order of a district court, or of a Circuit Court of Appeals, remanding a cause. * * * * * * The Supreme Court of the United States cannot, by a writ of error to the final judgment of a state court, review an order remanding a cause which was made by a Federal Court. * * * * * * An order remanding a cause cannot be reviewed by mandamus."

Numerous authorities, fully sustaining the foregoing statement, are cited in the notes.

It is too clear to admit of question that a writ of mandamus cannot issue.

II.

DID JUDGE WADDILL ERR IN REMANDING TO THE STATE COURT IN WHICH IT WAS BEGUN A SUIT BETWEEN CITIZENS OF DIFFERENT STATES REMOVED TO THE FEDERAL COURT OF A DISTRICT IN WHICH NEITHER THE PLAINTIFF NOR THE DEFENDANT RESIDED?

We are so certain of the soundness of the objections to the remedy sought that we are confident this Court will not undertake to inquire, at this time and in the manner proposed, whether the case ought, or ought not, to have been remanded. Nevertheless, as the question is raised in the petition and argued in the brief, we suppose it proper to point out that whatever difference of opinion there may be on the part of the several District Courts there is no doubt as to the views of this Court. They are that the statute vests the District Courts with jurisdiction wherever there exists the requisite diversity of citizenship, and the amount in controversy, exclusive of interest and costs, exceeds $3,000, but the courts which may exercise this jurisdiction are those only of the District in which either the plaintiff or the defendant resides, and no suit can be removed to any court in which it could not have been brought. Such difference of opinion as has arisen in the District Courts seems attributable to the convenient or inconvenient results which the Judges of those courts felt might follow in the instant cases. This Court, however, is certainly not called upon to renew the expression of its views upon a point in respect to which its opinion has been already clearly

set forth. In the Wisner case, *supra,* it was held there was no right to remove certainly unless both the plaintiff and defendant consented. In the Moore case, *supra,* the cause was not remanded because the defendant consented to the exercise of its powers by removing the case, and the plaintiff by amending its pleadings, and thereby invoking the jurisdiction of, the Federal Court. In the Harding case, *supra,* the decision turned upon the propriety of the petitioner's remedy, and the Court never came to the question of whether the case was, or was not, properly removed. It, however, reviewed and modified in some respects the Wisner and Moore cases, and it must be assumed that if it had dissented from the doctrine of those cases as to the right of removel there would have been some intimation of that fact. In the Park Square Automobile Station case the motion to remand was based upon the ground that as the suit was begun in a New Hampshire State Court it should have been removed to the Federal Court in that State, and not to the Federal Court in New York, because the defendant resided there. The decision was rested upon the ground that a mandamus was not a proper remedy, and the Court never came to consider whether the case could, or could not, have been rightfully remanded, but discussed and approved the Harding and Roe cases which it could not have done if it had disapproved the conclusion announced in the Wisner and Moore cases.

JUDGE WADDILL'S OPINION.

Judge Waddill has been a United States Judge for twenty years, and the official reports show, we think, that during that time he has been called upon to hear and determine as large a number of important cases as any of his associates on the Federal Bench, and that no one of them has been affirmed in a greater percentage of cases, although very numerous appeals have been taken from Judge Waddill's decisions be-

cause of the large amounts and difficult questions involved in the cases decided by him. His opinion is the most recent announcement on the point at issue. It was evidently written after careful study of the authorities, and is entitled to great weight, and should prevail, in the absence of convincing authority or reasoning to the contrary. We submit that there is a total absence of both in the brief in support of the petition.

PETITIONER'S BRIEF.

It may be we should reply in detail to petitioner's brief, and criticise at length the cases to which reference is made, but it seems to us not worth while to do so for the obvious reason that, as to the remedy, the petitioner is proceeding merely upon an assumption, not only unsupported by authority, but in plain, unequivocal, conflict with the often expressed views of this Court, and, as to the merits, only upon the theory that because there has heretofore been some difference of opinion upon the part of the several District Judges, this Court should restate what it has heretofore said, in the face of the fact that Congress has now seen fit to make the action of the trial Courts in respect to the remanding of cases final, and not reviewable by appeal, certiorari, mandamus, or any other means. Moreover, we are unable to gather from the brief any clear idea of the grounds upon which the petitioner thinks it has a right either to the remedy, or the relief, sought. There is an indiscriminate citation of cases bearing upon sections of the statute totally unlike those under review, such, for example, as the reference to *In the Matter of Tobin,* 214 U. S. 506, and *In the Matter of Athanasi Nicola,* 218 U. S. 668. These cases arose out of the clauses of the statute dealing with the rights of aliens. Many other cases are cited, but they seem to us no more in point than those mentioned. The brief contains many such statements as

"A logical application of the doctrine of Ex Parte Wisner, *Supra,* would prevent the removal of all such causes contrary to the permissive provisions of Section 28 of the Code.

"* * * * * * * The construction of the removal statute in Wisner, *Supra,* effects inconsistencies resulting in inconveniences and injustice."

We confess ourselves unable to answer these, and like, statements, because it seems to us it would be moving in a circle to attempt to trace their relationship to the points at issue.

CONCLUSION.

It is beyond question, we submit, that the petitioner is entitled to no relief, and that if the contrary were the case it has invoked the wrong remedy; that the petition is wholly without merit, and that it, together with all proceedings had thereon, should be summarily dismissed.

Respectfully submitted,
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